

COA NO. 70253-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ORLEN DARDEN,

Appellant.

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JENNIFER L. HARRIS

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael C. Hayden, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
Issue Pertaining to Assignments of Error	1
B. <u>STATEMENT OF THE CASE</u>	1
i. <i>Procedural Facts</i>	1
ii. <i>Trial</i>	2
C. <u>ARGUMENT</u>	12
1. IN-COURT IDENTIFICATIONS VIOLATED DUE PROCESS, AND THE TRIAL COURT ERRED IN DECLINING TO GRANT A MISTRIAL AFTER EYEWITNESSES SAW DARDEN IN SHACKLES OUTSIDE THE COURTROOM AND THEN TOOK THE STAND AND IDENTIFIED DARDEN AS THE ROBBER.....	12
a. The court declined to grant a mistrial after eyewitnesses in the hallway saw Darden in shackles coming to and from the courtroom.....	13
b. It was impermissively suggestive for eyewitnesses to view Darden in shackles in the hallway before making in-court identifications.....	14
c. The in-court identifications are unreliable under the totality of circumstances	22
i. Opportunity to view at the time of the crime.....	23
ii. Degree of attention.....	25
iii. Accuracy of prior description	27
iv. Level of certainty	28

v. Passage of time 31

vi. Other circumstances..... 32

vii. Weighed against the corrupting effect of the suggestive identification 32

d. Reversal is required because the trial court based its denial of a mistrial on an erroneous view of the law and there is a substantial likelihood that the tainted in-court identifications affected the outcome 33

D. CONCLUSION..... 37

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Allen</u> , 176 Wn.2d 611, 294 P.3d 679 (2013).....	32
<u>State v. Ammlung</u> , 31 Wn. App. 696, 644 P.2d 717 (1982)	30
<u>State v. Birch</u> , 151 Wn. App. 504, 213 P.3d 63 (2009), <u>review denied</u> , 168 Wn.2d 1004, 226 P.3d 780 (2010)	17, 18
<u>State v. Burrell</u> , 28 Wn. App. 606, 625 P.2d 726 (1981)	23
<u>State v. Chanthabouly</u> , 164 Wn. App. 104, 262 P.3d 144 (2011), <u>review denied</u> , 173 Wn.2d 1018, 272 P.3d 247 (2012)	33
<u>State v. Escalona</u> , 49 Wn. App. 251, 742 P.2d 190 (1987)	33
<u>State v. Finch</u> , 137 Wn.2d 792, 975 P.2d 967 (1999)	19
<u>State v. Guzman-Cuellar</u> , 47 Wn. App. 326, 734 P.2d 966 (1987)	18
<u>State v. McDonald</u> , 40 Wn. App. 743, 700 P.2d 327 (1985)	14, 24, 30
<u>State v. Quismundo</u> , 164 Wn.2d 499, 192 P.3d 342 (2008)	34
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994)	34

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Shea,
85 Wn. App. 56, 930 P.2d 1232 (1997)..... 18

State v. Smith,
36 Wn. App. 133, 672 P.2d 759 (1983)..... 20

State v. Traweek,
43 Wn. App. 99, 104, 715 P.2d 1148 (1986),
disapproved on other ground by
State v. Blair,
117 Wn.2d 479, 816 P.2d 718 (1991)..... 23

State v. Williams,
18 Wn. 47, 50 P. 580 (1897)..... 19

Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,
122 Wn.2d 299, 858 P.2d 1054 (1993)..... 34

FEDERAL CASES

Manson v. Brathwaite,
432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)..... 15, 22

Neil v. Biggers,
409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)..... 15, 22, 34

Raheem v. Kelly,
257 F.3d 122 (2d Cir. 2001),
cert. denied, 534 U.S. 1118, 122 S. Ct. 930, 151 L. Ed. 2d 892 (2002)
..... 26, 28

Reese v. Fulcomer,
946 F.2d 247 (3d Cir. 1991) 21

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Simmons v. United States,
390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968)..... 14, 32

United States v. Bush,
749 F.2d 1227 (7th Cir. 1984) 20

United States v. Emanuele,
51 F.3d 1123, 1130 (3d Cir. 1995) 15, 16, 18, 29, 30, 32

United States v. Rogers,
126 F.3d 655 (5th Cir. 1997) 19, 20

United States v. Rundell,
858 F.2d 425 (8th Cir. 1988) 20

United States v. Russell,
532 F.2d 1063 (6th Cir. 1976) 17, 18, 24, 35

United States v. Williams,
436 F.2d 1166 (9th Cir. 1970),
cert. denied, 402 U.S. 912, 91 S. Ct. 1392, 28 L. Ed. 2d 654 (1971) 20

RULES, STATUTES AND OTHER AUTHORITIES

ER 403 2, 14

U.S. Const. amend. XIV 14

Wash. Const. art. I, § 3 14

A. ASSIGNMENTS OF ERROR

1. The trial court erred in declining to grant a mistrial after eyewitnesses to the crime saw appellant in shackles outside the courtroom and then made in-court identifications of appellant as the perpetrator of the crime.

2. Allowing eyewitnesses to see appellant in shackles prior to making in-court identifications violated appellant's right to due process.

Issue Pertaining to Assignments of Error

Where eyewitnesses saw appellant in shackles outside the courtroom before making in-court identifications, whether the trial court erred in denying appellant's motion for mistrial due to a violation of appellant's right to due process?

B. STATEMENT OF THE CASE

1. *Procedural Facts*

The State charged Orlen Darden with two counts of first degree robbery while armed with a firearm. CP 1-3. The court denied the State's motion to amend the information to include a count of unlawful possession of a firearm. 1RP¹ 7-11.

¹ The verbatim report of proceedings is referenced as follows: 1RP – 2/27/13; 2RP – 3/4/13 (voir dire); 3RP – 3/4/13; 4RP – 3/5/13 (morning); 5RP – 3/5/13 (afternoon); 6RP – 3/6/13; 7RP – 3/7/13; 8RP – 3/11/13; 9RP – 3/12/13; 10RP – 4/18/13.

Before trial, defense counsel moved to exclude out-of-court and in-court identifications of Darden on grounds of due process and ER 403. CP 21-25; 1RP 88-96. Counsel argued the photomontage was unduly suggestive because Darden had the darkest skin of the men in the six photos while any in-court identification would be unduly prejudicial, akin to a "show up on steroids." CP 21-25; 1RP 89-91, 95-97. The court denied the motion. 1RP 94-97.

After eyewitnesses saw Darden in shackles outside the court and then identified him in court, the court declined to declare a mistrial. 4RP 88-91. A jury found Darden guilty as charged. CP 41-44. The court imposed a total of 291 months confinement. CP 79. Darden appeals. CP 211-20.

2. *Trial*

Lauren Acheson and her husband Christopher Tanghe were walking in the Capitol Hill neighborhood of Seattle around 12:30 a.m. on July 29, 2012. 3RP 29-32; 6RP 5-6, 31. Two men boxed them in on the sidewalk. 3RP 32; 6RP 7. The shorter man pulled out a pistol and stuck it in Tanghe's face, saying "this is real. Give us your stuff" and "don't make it a homicide." 3RP 32-33; 6RP 7, 9. The men took Tanghe's laptop bag and Acheson's purse. 3RP 33-34; 6RP 7-8. They fled when other pedestrians approached. 3RP 33-34; 6RP 9. Tanghe called 911. 3RP 36.

During the encounter, Tanghe looked at the man with the gun. 6RP 12. He got a better look at the person with the gun than the one in front of Acheson, but it was dark, the street lighting was poor, and they were under a tree between street lamps. 6RP 13, 17-18. Tanghe could not describe the person or necessarily pick him out. 6RP 13. He described the person as having braids, a pockmarked face and a goatee, and also as husky, although the bulky clothes made it hard to tell. 6RP 9, 21-22. According to Tanghe, neither he nor his wife had a clear image of what the robbers looked like. 6RP 28. The whole incident took two or two and a half minutes. 6RP 12. Police arranged a show up of two individuals a short time later, but Acheson and Tanghe were sure they were not the perpetrators. 3RP 36; 6RP 12.

At one point in her testimony, Acheson said she "really couldn't see their faces." 3RP 34. At another point she said she looked at the face of the person in front of her but "couldn't give a clear depiction." 3RP 35. She told a defense interviewer that she only got a vague look. 3RP 45-46. Acheson described the one in front of her as larger, taller, and broader than the other. 3RP 34. Both were African American with "darker complexes." 3RP 34-35, 46. The dark skin was a defining characteristic for her, the bulk of the man in front of her being the other. 3RP 46, 48.

Acheson felt like the incident lasted 5 or 10 minutes. 3RP 43. The lighting was poor. 3RP 43, 45.

When Acheson was later shown a photomontage containing Darden, she initially identified him with 70 percent certainty as one of the robbers. 3RP 37-40, 47-48; Ex. 2, 3. She agreed the person in slot 2 of the montage (Darden) was the darkest skinned person in there. 3RP 47. Soon thereafter, she e-mailed the detective and lowered the confidence of her pick to 30 to 40 percent. 3RP 37, 48. When asked in court if she recognized the man who approached her on Capitol Hill, Acheson identified Darden with 80 percent confidence. 3RP 40.

Tanghe was unable to identify anyone in the montage as the robber.² 6RP 14-15, 25-26; Ex. 32. When asked to make an in-court identification, Tanghe could not say with certainty but pointed to Darden as having general similarities in terms of hair, height, and build. 6RP 16. He could not identify the specifics of the face. 6RP 16.

At about 1 a.m. on July 29, another robbery occurred in the West Seattle neighborhood. 4RP 5-7, 16, 54, 83. Alison Fulton and her friend Lynn Matthyse, who was visiting from out of town, were walking home

² On the stand, Tanghe confused the montage with a lineup in which he did not identify anyone as the perpetrator. 6RP 14-15, 25-26.

from a bar.³ 4RP 5-6, 52. It was dark. 4RP 7, 67. Two men approached. 4RP 6. Matthyse only caught a glimpse of an outline. 4RP 7. One man was shorter than the other and had a slighter build. 4RP 7-8, 55. They were just shadows. 4RP 55. One of the men asked for a cigarette and the time. 4RP 6, 54. As the women turned a corner, they realized the taller man was right behind them. 4RP 6, 7-8. The man said sorry, pulled out a gun, and demanded their purses. 4RP 6, 54. They were in shock. 4RP 9. Fulton handed over her purse. 4RP 9, 56, 59. Matthyse argued with the man about turning her purse or camera over. 4RP 9, 57.

A car came around the corner. 4RP 9. Matthyse backed out into the street and tried to wave it down, but the car kept going. 4RP 9. The man took Matthyse's purse and ran off. 4RP 10-11.

Matthyse and Fulton described the robber to police as a dark skinned black male, approximately 6'2" tall. 5RP 31. Matthyse estimated the man weighed 200 to 250 pounds. 4RP 19. She looked at his face during the argument, which lasted no more than a minute. 4RP 9-10. Fulton estimated the encounter lasted three to five minutes, with half the time spent looking at the robber and the other half at Matthyse. 4RP 78. The whole incident did not last very long. 4RP 69. Fulton was three feet

³ Fulton and Matthyse had a few drinks at the bar before walking home. 4RP 5. Matthyse said she was "not really" under the influence of alcohol. 4RP 5. Fulton denied being intoxicated. 4RP 52.

away and she got a look at his face. 4RP 58, 77-78. The lighting was "somewhat poor." 4RP 69. A jacket that covered part of the man's head and face made it more difficult to see him. 4RP 69.

Andrew Masters, who had come out of his residence to walk his dog, heard someone say "I've got to get on a plane. Stop. That's my purse." 4RP 42-43. Masters saw a tall African-American man walk by fast, picking up his pace. 4RP 43. He had on a hooded jacket. 4RP 48, 50. Masters and Matthyse gave chase for a block or two. 4RP 12, 43-44. The man jumped into the passenger side of a Buick, which sped off. 4RP 13, 29, 44-45. Masters called out the license plate number. 4RP 13, 44. Matthyse called 911. 4RP 14.

Police soon located the Buick with the matching license plate about ten blocks away parked in front of the residence belonging to Nikola, Lamar Travis's mother. 4RP 82-84, 87; 5RP 10, 17; 6RP 90. An officer observed Lamar Travis shut the trunk and walked toward the residence with a computer bag on his shoulder. 4RP 84-85; 5RP 11. He was arrested. 5RP 11. Police found various cards belonging to Acheson, Matthyse and Fulton on his person.⁴ 4RP 20-21, 59-60; 5RP 6-9, 11-12, 20-22; 6RP 44. Tanghe's laptop was in the shoulder bag. 5RP 9; 6RP 11. Police found a pistol in the trunk of the Buick. 4RP 88-89; 6RP 46. A

⁴ Matthyse did not get her Macy's card back. 4RP 20.

latent fingerprint lifted from the outside passenger door of the car was later determined to belong to Darden. 5RP 44, 48, 64. Police brought Matthyse and Fulton over for a show up, but they could not identify anyone. 4RP 14-15, 61-62, 71-72, 91-92.

Matthyse was emailed a photomontage in August. 4RP 15-17, 33; Ex. 6. She assigned 65 percent confidence in her pick of Darden as the robber, although she "couldn't say for sure." 4RP 17-18. The face stood out as similar to what she remembered in terms of bone structure, eyes, facial structure, and skin darkness. 4RP 17. In a defense interview, Matthyse said it was a process of elimination: "Was it this kind of skin? Was it this kind of skin?" 4RP 35-36. She chose the darkest skinned person from the montage. 4RP 37. Matthyse said she got a good look at the person, but was worried about her memory. 4RP 22-23. She agreed her memory faded over time. 4RP 27, 41. It was dark at the time of the robbery and she was in shock. 4RP 23, 25.

When asked if she recognized the man in court who robbed her, Matthyse identified Darden as the man she recognized in the montage. 4RP 18. She testified "I still cannot say 100 percent that's the man that robbed me, but I think I still hold true that I'm more sure that this is the man than anyone else I saw in the montage." 4RP 18-19. She had an emotional reaction to seeing Darden in court, the same reaction she had

when she saw someone before but could not recall where, and the same reaction that she had when she looked at the montage. 4RP 39-40. She also stated "I'm less sure that the man in the photo to -- was the one that robbed us." 4RP 39.

Fulton looked at the montage about a month after robbery. 4RP 64; Ex. 13. She was unable to make a selection, not even with low confidence. 4RP 64-65, 74, 76. But when asked to identify the robber in court, she identified Darden — the only African American sitting at counsel's table — with a whopping 95 percent certainty. 4RP 58, 74-75, 79. Fulton said "the way he looks at me" was familiar. 4RP 58-59. She maintained that seeing someone in person was different than seeing someone in a photograph; she recognized his "demeanor" and "the way he moves" from before. 4RP 65. Specifically, she said "he walks the same way." 4RP 66. She had seen how tall Darden was, which was consistent with her memory of the height of the robber.⁵ 4RP 65. Fulton acknowledged her memory was "probably" fresher when she looked at the montage and that her memory changes over time. 4RP 73, 75-76.

Masters was never asked to make an out-of-court identification. 4RP 45-46. When asked if he recognized anyone in the courtroom,

⁵ A detective testified that Lamar Travis is 5'11" and 203 pounds and Darden is 6'2" and 205 pounds. 7RP 52.

Masters answered "Not right away, no." 4RP 46. But when asked if he saw any similarities in the person he saw running and anyone in the courtroom, Masters pointed to Darden, saying aside from being African American he was similar in height and build. 4RP 46-47. Masters was able to observe Darden's height before testifying. 4RP 50.

The State attempted to associate Darden with Travis through other evidence. On the evening of July 28, Travis was at his grandmother Gloria's home, where he lived. 3RP 19. Darden called there that night, asking for Travis.⁶ 3RP 22. Gloria told Darden that Travis was asleep. 3RP 22. About an hour later, Darden called again and asked Gloria to wake Travis up. 3RP 22. Gloria woke Travis and saw him talking on the phone with Darden. 3RP 22. Travis left the house. 3RP 22.

Travis went home to his mother Nikola's house and asked to borrow her car sometime after 9 o'clock at night. 6RP 97, 129. She gave him the keys and he left in the car.⁷ 6RP 97-98.

After Lamar Travis was arrested, Nikola claimed that Darden told her that "it was all Lamar's idea" and apologized. 6RP 90, 113. Nikola

⁶ Gloria had known Darden for years because he and Travis were friends and former schoolmates. 3RP 21.

⁷ According to Nikola, Darden and Travis had been friends for years. 6RP 94. Nikola let her son borrow her car three or four times a week. 6RP 93-94.

had an extensive criminal history, having been convicted of many crimes of dishonesty over the years. 6RP 118-19, 125-27.

Upon his arrest, police showed Darden a photograph of Lamar Travis. 7RP 7-9. Darden said he looked familiar, acknowledged they had grown up together, and that he had last seen him in May or early June. 7RP 9. He denied riding in a car with Travis. 7RP 12-13. When told his fingerprint was found on the car, he said Nikola had braided his hair around June.⁸ 7RP 13-14.

Darden presented an alibi defense at trial. Darden's mother, Porcia Green, testified that her son was with her during the time of the two robberies. 7RP 123, 127. Green explained that she had two parties associated with her birthday, a get together on July 28th and a surprise party on August 4th. 7RP 124. Darden was at the July 28th party, which lasted from around 8 o'clock to around 2:30 or 3 in the morning.⁹ 7RP 126-27. Darden stayed the night because he was ill.¹⁰ 7RP 127-28.

⁸ Nikola claimed she never braided Darden's hair. 6RP 96.

⁹ When a detective called her and asked the date of her birthday party, she thought he meant the surprise party and told him it was the 4th; she wasn't thinking of the smaller get together on the 28th. 7RP 130, 138. Green denied telling the detective that she could not remember if Darden stayed at her house on the 28th. 7RP 137-38. The detective testified that Green said Darden probably stayed over on the 28th, but could not specifically remember. 7RP 171-72.

¹⁰ Darden's counselor testified that Darden looked sick on August 1 when she met him. 7RP 121.

Darden's cousin attended the July 28th get together as well. 7RP 142. She maintained Darden was there and did not leave when she did at 2:30 or 3 in the morning.¹¹ 7RP 143-44, 150. Darden's neighbor, who attended the smaller get together to celebrate the birthday on the 28th as well as the bigger party on the 4th, testified to the same effect. 7RP 152-56. The neighbor also noted Darden was sick and throwing up.¹² 7RP 155.

The State presented phone records associated with the phones used by Darden, his sister Brittany, his mother Green, and Gloria. Ex. 40, 41; 7RP 5-6, 11-12, 30, 36. There were four calls between Darden's phone and Gloria's phone on July 28; the first one at 3:37 p.m. and the last one at 9:46 p.m. 7RP 30-31.

There were three calls between Green's phone and Darden's phone on July 28; the first one at 7:48 p.m. and the last one at 11:54 p.m. 7RP 167-68. Right after, there were five outgoing calls from Brittany's phone to Darden's phone. 7RP 169. At 1:20 a.m. on the 29th, there was an outgoing call from Green's phone to Darden's phone.¹³ 7RP 169.

¹¹ She confirmed there was a bigger party for Green on August 4th. 7RP 144

¹² She told the defense investigator that Darden got sick because he was drunk. 7RP 159

¹³ Green testified that Brittany was at the July 28 party, though she might have gone to pick up her friend at some point. 7RP 131. Darden's cousin testified that Brittany was there the whole time. 7RP 149. Green testified that family members call each other on the cell phone while in the house.

The last outbound call from Darden's phone was at 11:28 p.m. to his sister. 7RP 32, 54-55. The next outbound call was at 1:10 a.m. on July 29 to his sister. 7RP 32, 54. His sister called Darden five times starting at 12:06 a.m. on the 29th. 7RP 55

Darden called Gloria's phone at 1:49 a.m. on July 29. 7RP 33. Someone using Gloria's phone later called Darden; the call went to voicemail/call forwarding. 7RP 33. A call from Darden's phone was made to Macy's account services at 3:46 a.m. on July 29. 7RP 34.

C. ARGUMENT

1. IN-COURT IDENTIFICATIONS VIOLATED DUE PROCESS, AND THE TRIAL COURT ERRED IN DECLINING TO GRANT A MISTRIAL AFTER EYEWITNESSES SAW DARDEN IN SHACKLES OUTSIDE THE COURTROOM AND THEN TOOK THE STAND AND IDENTIFIED DARDEN AS THE ROBBER.

Allowing eyewitnesses to a crime to view the accused outside the courtroom in shackles before identifying him in court is an impermissively suggestive identification procedure, especially where the accused is the only black person at counsel's table. Considering the totality of circumstances, the in-court identifications are not reliable when weighed against the corrupting influence of the suggestive viewing. Darden's right

7RP 140. According to the neighbor, people could pretty much see one another all of the time because of the size of the house. 7RP 156.

to due process was violated and the trial court erred in declining to grant a mistrial based on the unreliable in-court identifications.

- a. The court declined to grant a mistrial after eyewitnesses in the hallway saw Darden in shackles coming to and from the courtroom.**

After Fulton testified on March 5, defense counsel expressed concern that "witnesses have been in the hallway, and have been observing Mr. Darden coming to and from court while in shackles." 4RP 88. Counsel thought this was prejudicial for the same reason why jurors are not supposed to see a defendant in shackles. 4RP 88. It was particularly prejudicial in a case based on identification. 4RP 88. Counsel was also concerned that witnesses were getting evidence of Darden's "gait and walking" outside of court. 4RP 88. Counsel stated "I don't think there is any remedy at this point short of a mistrial, but I want to make the record." 4RP 89.

The court said there was no case law that prohibited witnesses from observing a defendant in shackles or that such an observation rendered identification impermissible, likening it to a lineup or show up at the scene of the crime. 4RP 89-90. The court was not disturbed by witnesses making observations of Darden's physical attributes because it could have ordered Darden to display himself to witnesses in the same manner, at least outside of the jury's presence. 4RP 89-90.

Counsel observed the situation was distinguishable from a lineup or show up on the night of the incident. 4RP 90. The court gave counsel the lunch hour to find case law "that says a witness may not see a defendant in cuffs" and that it was prejudicial. 4RP 90-91. Counsel referenced ER 403 and wanted to make it clear "I haven't been objecting as the inquiry has happened because I think that record is preserved from pretrial motions." 4RP 91.

Tanghe was the only witness remaining that would be asked to make an identification. 5RP 2-3. To be "cautious," the court directed Tanghe not be allowed to see Darden in handcuffs. 5RP 3. The court reiterated its belief that there was no case law on the issue.¹⁴ 5RP 3.

b. It was impermissibly suggestive for eyewitnesses to view Darden in shackles in the hallway before making in-court identifications.

Impermissibly suggestive out-of-court identification procedures violate due process where there is a substantial likelihood of irreparable misidentification. Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); State v. McDonald, 40 Wn. App. 743, 746, 700 P.2d 327 (1985); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. If a defendant establishes that a procedure is impermissibly suggestive, the

¹⁴ Before Tanghe testified, Darden was ordered to stand outside the presence of the jury so that Tanghe could get a look at him. 6RP 4.

court must then determine whether, under the totality of the circumstances, the identification testimony is reliable in spite of the impermissibly suggestive procedure. Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

To determine the reliability of identification testimony, courts consider the following factors: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty when viewing a defendant or his image, and (5) the length of time between the crime and the identification procedure. Biggers, 409 U.S. at 199-200; United States v. Emanuele, 51 F.3d 1123, 1128 (3d Cir. 1995). "Against these factors is to be weighed the corrupting effect of the suggestive identification itself." Brathwaite, 432 U.S. at 114.

The threshold issue here is whether witness observation of Darden in shackles outside the courtroom is impermissibly suggestive, rendering the subsequent in-court identifications unreliable. The trial court believed there was no case law on the issue of whether it is improper for a witness to see the defendant in shackles before making an in-court identification. The court was mistaken.

In Emanuele, the Third Circuit suppressed the in-court identification of the defendant by a bank teller where she had earlier observed him being led to court in shackles by U.S. Marshals. Emanuele, 51 F.3d at 1127, 1130. The teller could not identify the robber from an earlier photomontage. Id. at 1126. While waiting to testify, the teller saw the defendant being led out of the courtroom in manacles. That teller and another teller involved in a separate robbery spoke with one another and said, "it has to be him." Id.

Emanuele recognized "to walk a defendant — in shackles and with a U.S. Marshal at each side — before the key identification witnesses is impermissibly suggestive." Id. at 1130. Turning to whether the in-court identification was unreliable, the court rejected the government's argument that the unobstructed view of the robber at the time of the robbery weighed in favor of admission of the identification. Id. The teller's protracted and clear view of the robber highlighted her earlier inability to pick the defendant out of the photomontage. Id.

Whether subsequent viewings create a substantial risk of misidentification may depend on the strength and propriety of the initial identification. Id. at 1131. The court held the teller's failure to identify the defendant despite the opportunity to observe, combined with the impermissibly suggestive "viewing of the defendant in conditions reeking

of criminality, bolstered by the comments of another witness," rendered the in-court identification unreliable.¹⁵ Id.

The Sixth Circuit, meanwhile, has held it is impermissively suggestive to permit an eyewitness to observe a defendant in manacles, where the witness made no identification until after he observed the defendant in manacles just before the preliminary hearing. United States v. Russell, 532 F.2d 1063, 1069 (6th Cir. 1976).

Under Russell and Emanuele, it was impermissively suggestive for witnesses to see Darden in shackles before they gave in-court identification testimony. Emanuele, 51 F.3d at 1130; Russell, 532 F.2d at 1069.

Division Three reached a different conclusion in State v. Birch, 151 Wn. App. 504, 513, 515, 213 P.3d 63 (2009), review denied, 168 Wn.2d 1004, 226 P.3d 780 (2010). In Birch, a witness saw the defendant escorted by law officers and wearing handcuffs in the hallway before the in-court identification. Birch, 151 Wn. App. at 513, 515. Division Three rejected the argument that this event alone demonstrated unnecessary suggestiveness, comparing it to a show-up identification that takes place

¹⁵ The in-court identification of the other teller involved in the separate robbery was not deemed unreliable because that teller had initially identified the defendant from a photomontage. Emanuele, 51 F.3d at 1131.

immediately after the crime occurs. Birch, 151 Wn. App. at 515 (citing State v. Guzman-Cuellar, 47 Wn. App. 326, 336, 734 P.2d 966 (1987); State v. Shea, 85 Wn. App. 56, 60, 930 P.2d 1232 (1997)). In its cursory decision, Division Three made no attempt to justify the comparison with a show-up procedure and did not cite Emanuele or Russell. Birch is poorly reasoned and should not be followed.

Allowing eyewitnesses to see the defendant in shackles right before making an in-court identification trial is more suggestive than a show-up identification made right after the crime occurred.¹⁶ At a show-up immediately after a crime has taken place, the witness has a fresh memory reasonably knows there is at least some likelihood that the person shown may not be the perpetrator. The police in that situation are working in the heat of the moment. Exigencies are involved. The right person may or may not be displayed to the witness under those circumstances.

But at trial, the witness may feel a much greater obligation to make an identification because the judicial process is not only already underway but has reached the pinnacle of a trial. Memories fade or change over time. There is a substantial danger that a witness who cannot make an identification thinks that the process could not have come so far unless the

¹⁶ Detective Clement testified a show-up identification procedure is only legitimate if it takes place close in time to the incident. 7RP 76.

police, the prosecutor, and the court believed they had the right person. From there, it is a simple matter for the witness just to identify the person seen in shackles and then seated as the defendant in the courtroom, regardless of whether the witness truly recognizes him from the criminal event. See United States v. Rogers, 126 F.3d 655, 659 (5th Cir. 1997) ("Even the best intentioned among us cannot be sure that our recollection is not influenced by the fact that we are looking at a person we know the Government has charged with a crime.").

Defense counsel astutely pointed out that allowing eyewitnesses to see Darden in shackles in the hallway was prejudicial for the same reason why jurors are not supposed to see a defendant in shackles. 4RP 88. Shackling or handcuffing a defendant is discouraged because when a defendant is brought before the jury in restraints, the "jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers." State v. Finch, 137 Wn.2d 792, 845, 975 P.2d 967 (1999) (quoting State v. Williams, 18 Wn. 47, 51, 50 P. 580 (1897)). Eyewitnesses to a crime are no more immune to the prejudicial effect of shackling than jurors. Indeed, eyewitnesses are more susceptible to draw an improper inference from the shackling because, unlike jurors, they are not instructed by the court to ignore such matters.

Even if seeing Darden in shackles in the hallway was not impermissibly suggestive standing alone, the combination of the hallway viewing and the fact that Darden was the only black man sitting at counsel's table ultimately rendered the cross-racial in-court identifications impermissibly suggestive.

In-court identifications are inherently suggestive because the defendant is conspicuously seated in relative isolation at counsel's table. United States v. Williams, 436 F.2d 1166, 1168 (9th Cir. 1970), cert. denied, 402 U.S. 912, 91 S. Ct. 1392, 28 L. Ed. 2d 654 (1971); United States v. Rundell, 858 F.2d 425, 427 (8th Cir. 1988). It has been held that it is impermissibly suggestive to ask a witness to identify a perpetrator in the courtroom when it is clear who is the defendant and the defendant is of a different race than the witness. Rogers, 126 F.3d at 658. Such is the case here. These were all cross-racial identifications. 7RP 64-65.

Other courts have held in-court identification, standing alone, is not per se impermissibly suggestive. See State v. Smith, 36 Wn. App. 133, 138-40, 672 P.2d 759 (1983) (in-court identification not unduly suggestive where a black defendant was seated alone at defense counsel table with no other black persons nearby); United States v. Bush, 749 F.2d 1227, 1232 (7th Cir. 1984) (suggestive circumstance of having defendant sit at

counsel table does not establish a due process concern for in-court identification).

But here, the in-court identification does not stand alone. It stands together with the preceding hallway viewing and each adds to the overall suggestiveness of the identification procedure. Coupled with the hallway viewing of Darden in shackles, the result is impermissible suggestiveness because the two events were close in time, with the hallway viewing leading into the in-court identification. The dynamics of making the identification of Darden as the only black man sitting at counsel table after witnesses of a different race had seen him outside the courtroom in shackles combined to render the in-court identification procedure impermissibly suggestive.

"Whether multiple, but individually proper, viewings of a suspect are deemed 'impermissibly suggestive' may depend on the strength and propriety of the initial identification. If the initial identification is definite and the procedure is proper, subsequent viewings can be considered as redundant, or at most, reinforcing. If the initial identification is either nonexistent or weak, however, subsequent viewings may be impermissibly suggestive." Reese v. Fulcomer, 946 F.2d 247, 262 (3d Cir. 1991). As set forth in further detail below, the initial identifications were nonexistent (Fulton) or weak (Acheson, Matthyse) or there was no opportunity for a

prior identification (Masters). That factor supports Darden's argument that the hallway viewing and the in-court viewing combined to create an impermissibly suggestive identification procedure.

c. The in-court identifications are unreliable under the totality of circumstances.

The next step is to determine, under the totality of circumstances, whether the in-court identifications were reliable in spite of the impermissibly suggestive procedure. Biggers, 409 U.S. at 199-200; Brathwaite, 432 U.S. at 114.

In this regard, it is necessary to specify which eyewitnesses are at issue here. After Fulton testified on March 5, defense counsel expressed concern that "witnesses have been in the hallway, and have been observing Mr. Darden coming to and from court while in shackles." 4RP 88. Fulton, Matthyse and Masters all testified on March 5. Acheson testified on March 4. The witnesses referred to by counsel were not named on the record, though the context of the discussion shows eyewitnesses were involved and the trial court broadly referred to all the eyewitnesses that had testified in explaining its ruling. 4RP 88-91. The in-court identifications of Fulton, Matthyse and Masters are therefore implicated. Tanghe testified on March 6 after the matter was rectified, so

his in-court identification is not implicated by the impermissible hallway viewing. See 5RP 3 ("tell him to stay away from the cuffed defendant.").

i. Opportunity to view at the time of the crime

● Capitol Hill Robbery

Acheson and her husband were in close proximity to the robbers but Acheson "really couldn't see their faces." 3RP 34, 45. She also testified she remembered looking at the face of the person in front of her but "couldn't give a clear depiction of that." 3RP 35. She said she got "more than just passing look" but told a defense interviewer she only got a vague look. 3RP 45-46.

She felt like the incident lasted 5 or 10 minutes. 3RP 43. But the lighting was poor because the trees blocked out the streetlights on the sidewalk. 3RP 31, 43, 45. It was hard to see. 3RP 46. The duration of the encounter does not matter much when the lighting conditions for making an observation are lousy. Cf. State v. Traweck, 43 Wn. App. 99, 104, 715 P.2d 1148 (1986) (fact that store clerk got a good look at the robber in a well-lit store weighed in favor of admissibility), disapproved on other ground by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991); State v. Burrell, 28 Wn. App. 606, 611, 625 P.2d 726 (1981) ("Both witnesses saw the attack, which occurred in a well-lighted area. Both first noticed [the defendant] some 5 minutes before the attack.").

Tanghe's testimony corroborated that it was dark, the street lighting was poor, and they were under a tree between street lamps. 6RP 13, 17-18. According to Tanghe, neither he nor his wife had a clear image of what the robbers looked like. 6RP 28. Tanghe estimated the whole incident took two or two and a half minutes. 6RP 12; see McDonald, 40 Wn. App. at 747 (five to six minutes weighed against reliability when witness's view obstructed for half of the duration of the crime).

- West Seattle Robbery

As Matthyse and Fulton passed by the alley and noticed the two men, "[i]t was pretty dark." 4RP 7. There was just an outline of the men walking up the alley, one taller than the other. 4RP 7; 55. It was also "pretty dark" at the corner where the confrontation occurred. 4RP 7. There were "not a lot" of streetlights. 4RP 7, 23.

Matthyse looked at the man's face during the argument over giving up the camera, which she estimated to last no more than a minute. 4RP 9-10. She only got a look at the robber during the one minute they were engaged. 4RP 14, 25. It was dark at the time of the robbery and she was in shock. 4RP 23, 25; see Russell, 532 F.2d at 1066 ("There is a great potential for misidentification when a witness identifies a stranger based solely upon a single brief observation, and this risk is increased when the observation was made at a time of stress or excitement."). She did not

look at the robber when she ran into the street. 4RP 27. The man turned his back to her when he took off running. 4RP 12.

Fulton estimated the encounter lasted three to five minutes, with half the time spent looking at the robber and the other half at Matthyse. 4RP 78. The whole incident did not last very long. 4RP 69. She noticed the gun and what the man was wearing, but "for the most part" she was watching the interaction between the robber and Matthyse. 4RP 56.

Fulton was three feet away and got a look at his face. 4RP 58, 77-78. Fulton conceded the lighting was "somewhat poor" and acknowledged it was dark and hard to see. 4RP 69, 72. A jacket that covered part of the man's head and face made it more difficult to see him. 4RP 69.

Masters saw a tall African-American man walk by fast, picking up his pace. 4RP 43. He had on a big puffy coat with a hood. 4RP 44, 48, 50. Masters saw the side of his face for a second or two. 4RP 44. There was a streetlight 10 to 12 feet from where Masters stood, but he was "harder to see" when he sped up. 4RP 47. Masters could not remember if the hood was up or down, but acknowledged he told an officer that the hoodie was up when the man was running. 4RP 44, 48-50.

ii. Degree of attention

- Capitol Hill Robbery

Acheson was stressed, scared and surprised. 3RP 42. She was focused on the two robbers and wanting the encounter to end without being hurt. 3RP 44.

- West Seattle Robbery

Fulton did not focus on the man's face when he asked them questions about the cigarette and the time. 4RP 68. When he pulled out the gun, she looked at the gun and then his face. 4RP 68. "[I]t is human nature for a person toward whom a gun is being pointed to focus his attention more on the gun than on the face of the person pointing it." Raheem v. Kelly, 257 F.3d 122, 138 (2d Cir. 2001), cert. denied, 534 U.S. 1118, 122 S. Ct. 930, 151 L. Ed. 2d 892 (2002). She was scared and worried, her heart racing. 4RP 68. Fulton's attention was divided between looking at the robber and Matthyse. 4RP 78. It was stressful. 4RP 66. She watched Matthyse when the latter ran into the street. 4RP 70.

Matthyse noticed the gun. 4RP 25. She was focused on hoping she and her friend would not be shot. 4RP 25. She was not focused on remembering what the man looked like. 4RP 25. She looked over at Fulton a few times during the one minute period she was engaged with the robber. 4RP 26.

When Matthyse backed into the street, she was not watching the robber. 4RP 10. Instead, she was watching the passing car, trying to get

its attention. 4RP 10. She was focused on the car. 4RP 27. She then re-engaged the man, asked if she could keep her camera, and then handed over her purse, at which point the man ran off. 4RP 10-11. Fulton described Matthyse struggling with the robber over her purse. 4RP 77.

There does not appear to be anything that divided Master's attention during his limited encounter with the robber.

iii. Accuracy of prior description

- Capitol Hill Robbery

Acheson described the man in front of her as larger, taller, and broader than the other. 3RP 34. The other was a little shorter and leaner. 3RP 34. Both were African American with "darker complexes." 3RP 34-35, 46. The dark skin was a defining characteristic for Acheson, the bulk of the man in front of her being the other. 3RP 46, 48. She did not know if he had facial hair. 3RP 43.

- West Seattle Robbery

Matthyse and Fulton described the robber to police as a dark skinned black male, approximately 6'2" tall, and hair braided in corn rows.¹⁷ 5RP 31. Matthyse estimated the man weighed 200 to 250 pounds. 4RP 19. She further described the man as wearing darker,

¹⁷ According to the detective's testimony, Lamar Travis is 5'11" and 203 pounds and Darden is 6'2" and 205 pounds. 7RP 52.

slightly baggy jeans, tennis shoes, and a black hooded jacket. 4RP 28. He was taller and bulkier than the other man in the alley. 4RP 30. The lack of description of the robber's face weighs against reliability. See Raheem, 257 F.3d at 138 ("Nor do the descriptions of the shooter given by [the witnesses] instill any confidence as to the reliability of their identifications . . . for though they provided general information as to the shooter's age, height, and weight, they provided virtually no detail about his face.").

Fulton described the robber as wearing dark clothing and a hooded jacket. 4RP 69.

Masters was never asked to make a pre-trial identification. 4RP 45-46. He did not give a prior description in his testimony.

iv. Level of certainty

- **Capitol Hill Robbery**

When Acheson was shown a photomontage containing Darden, she initially identified him with 70 percent certainty as one of the robbers. 3RP 37-40, 47-48; Ex. 2, 3. She agreed the person in slot 2 of the montage (Darden) was the darkest skinned person in there. 3RP 47. Soon thereafter, she e-mailed the detective and lowered her confidence to 30 to 40 percent. 3RP 37, 48. After viewing Darden in shackles before

testifying, Acheson identified Darden with 80 percent confidence in court. 3RP 40.

Whether a subsequent viewing creates a substantial risk of misidentification depends in part on the strength of the initial identification. Emanuele, 51 F.3d at 1131. Acheson's certainty shot up 50 percent after the hallway viewing. This undermines the reliability of her in-court identification.

- West Seattle Robbery

In August, Matthyse assigned 65 percent confidence to her pick of Darden as the robber from a photomontage, but "couldn't say for sure." 4RP 17-18. In a defense interview, Matthyse said it was a process of elimination: "Was it this kind of skin? Was it this kind of skin?" 4RP 35-36. She chose the darkest skinned person from the montage. 4RP 37.

When asked if she recognized the man in court who robbed her, Matthyse identified Darden as the man she recognized in the montage. 4RP 18. Confusingly, she also stated "I'm less sure that the man in the photo to -- was the one that robbed us." 4RP 39. She testified "I still cannot say 100 percent that's the man that robbed me, but I think I still hold true that I'm more sure that this is the man than anyone else I saw in the montage." 4RP 18-19. Matthyse was worried about her memory. 4RP 22-23. She agreed her memory faded over time. 4RP 27, 41. There

is no appreciable difference in her level of certainty between the montage and the in-court identification.

Fulton is another story. She looked at the montage about a month after robbery. 4RP 64; Ex. 13. She was unable to make a selection, not even with low confidence. 4RP 64-65, 74, 76. Compare McDonald, 40 Wn. App. at 747 (reliability in question where witness unable to identify defendant in lineup the day after robbery) with State v. Ammlung, 31 Wn. App. 696, 700, 644 P.2d 717 (1982) ("the fact that the witnesses had an unimpeded view of the robbery suspect for approximately 3 minutes during the commission of the crime and had no trouble identifying [the defendant] at the lineup, indicates that no likelihood of mistaken identification was occasioned by any suggestiveness in the pretrial confrontation"). Fulton acknowledged her memory was "probably" fresher when she looked at the montage and that her memory changes over time. 4RP 73, 75-76. But when asked to identify the robber in court, she identified Darden — the only African American sitting at counsel's table — with 95 percent certainty. 4RP 58, 74-75, 79. The near absolute flip flop in certainty severely undermines the reliability of Fulton's in-court identification. Emanuele, 51 F.3d at 1131.

Fulton said "the way he looks at me" was familiar. 4RP 58-59. She maintained that seeing someone in person was different than seeing someone in a photograph; she recognized his "demeanor" and "the way he

moves" from before. 4RP 65. Specifically, she said "he walks the same way." 4RP 66. She had seen how tall Darden was, which was consistent with her memory of the height of the robber. 4RP 65. However, the only opportunity she would have had after the robbery to observe his height and gait was when he was handcuffed moving to and from the courtroom.

Masters stated nothing in terms of percentage or degree of certainty. When asked if he saw any similarities in the person he saw running and anyone in the courtroom, Masters pointed to Darden, saying aside from being African American he was similar in height and build. 4RP 46-47. The only opportunity Masters had to see Darden's height following the robbery would have been when Darden was escorted in shackles outside the courtroom.

v. Passage of time

Seven months passed between the robberies that took place on July 29, 2012 and the trial identifications that took place in March 2013. There is no reason to assume eyewitness ability to reliably identify the robber improved over time. To the contrary, Matthyse was worried about her memory and agreed it faded. 4RP 22-23, 27, 41. Fulton acknowledged her memory was fresher when she looked at the montage in which she was unable to pick out Darden and that her memory changes over time. 4RP 73, 75-76.

vi. Other circumstances

These were all cross-racial identifications. 7RP 64-65. Based on scientific research and evidence, there is no serious question about the inherent unreliability of eyewitness identification generally and of cross-racial eyewitness identification specifically. State v. Allen, 176 Wn.2d 611, 621 & n.4, 294 P.3d 679 (2013).

vii. Weighed against the corrupting effect of the suggestive identification

Considering all of the circumstances, there is "a very substantial likelihood of irreparable misidentification." Simmons, 390 U.S. at 384. Fulton's opportunity to view the assailant at the time of the crime was compromised by darkness. The cross-racial aspect of the identification further diminishes the reliability of her in-court identification. Fulton's complete failure to identify Darden as the robber despite the opportunity to observe him in the photomontage, combined with the impermissibly suggestive "viewing of the defendant in conditions reeking of criminality," rendered her in-court identification unreliable. Emanuele, 51 F.3d at 1131.

Acheson's drastic upward swing in confidence following her observation of Darden in shackles likewise demonstrates unreliability of her in-court identification. Her insufficient opportunity to view the assailant due to darkness especially weighs in favor of unreliability.

Further, her prior description was general and her identification is cross-racial.

Matthysse's in-court identification was also unreliable. The certainty of her prior montage identification and in-court identification was weak. She was not focused on the robber's face, it was dark at the time, her attention was divided, and her prior description was general.

Masters, meanwhile, made no prior identification until he described Darden as similar to the assailant in terms of race, height and build. His description was very general. Masters only saw the side of the robber's face for a second or two and gave no description of his face at trial. 4RP 44. Seeing Darden in shackles likely prompted Masters to make the in-court comparison, as he could not have observed Darden's height at any other time following the robbery.

d. Reversal is required because the trial court based its denial of a mistrial on an erroneous view of the law and there is a substantial likelihood that the tainted in-court identifications affected the outcome.

The trial court's decision to deny a motion for a mistrial is generally reviewed for an abuse of discretion. State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987). "A trial court abuses its discretion when it makes decisions based on untenable grounds or for untenable reasons." State v. Chanthabouly, 164 Wn. App. 104, 140, 262

P.3d 144 (2011), review denied, 173 Wn.2d 1018, 272 P.3d 247 (2012). A discretionary decision is made for untenable reasons if it is reached by applying the wrong legal standard. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

The trial court, in declining to grant a mistrial, mistakenly believed there was nothing wrong with eyewitnesses seeing the accused in shackles prior to taking the stand and identifying the accused as the perpetrator of the crime. It compared that event with a show-up identification procedure. 4RP 89-90. As argued above, that was an erroneous view of the law. Eyewitness observation of a defendant in shackles before taking the stand to identify him in court amounts to an impermissibly suggestive identification procedure. A trial court necessarily abuses its discretion "if it based its ruling on an erroneous view of the law." Quismundo, 164 Wn.2d at 504 (quoting Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)). The trial court did not address the Biggers factors in assessing the reliability of the in-court identifications because of its erroneous view that no impermissibly suggestive procedure was involved.

A trial court's denial of a mistrial will be overturned when there is a substantial likelihood that the error prompting the mistrial affected the jury's verdict. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

The in-court identifications were an important part of the State's case. 8RP 6-8.

Pre-trial identifications of Darden as the robber in each of the two robberies were either non-existent or equivocal. No witness identified Darden with certainty prior to trial. Detective Clement conceded the four pre-trial identifications from Tanghe, Acheson, Matthyse and Fulton were "poor." 7RP 84.

Tanghe, an eyewitness who was not tainted by seeing Darden in the hallway in shackles, was unable to identify anyone in the montage as the robber. 6RP 14-15, 25. When asked to make an in court identification, Tanghe could not say with certainty but pointed to Darden as having general similarities in terms of hair, height, and build, without being able to identify facial specifics. 6RP 16. Tanghe's untainted identification testimony was fairly weak.

Matthyse's level of certainty did not appreciably change from the pre-trial identification to her in-court identification. But Fulton's certainty zoomed from zero to 90 percent certainty. Acheson's certainty ramped up from 30 percent to 80 percent. The jury may well have been swayed by such testimony in finding Darden guilty. "[A] witness' in-court statement that 'he is the one' is probably the most dramatic and persuasive" identification evidence available. Russell, 532 F.2d at 1067.

The other evidence against Darden is not strong enough to avoid a substantial likelihood that the tainted in-court identifications affected the outcome. Lamar Travis's mother Nikola claimed that Darden told her "it was all Lamar's idea," thereby implicating Darden with knowledge that the robberies occurred and his involvement with those robberies. 6RP 90, 113. But the jury had reason to discount the veracity of that claim because Nikola had been convicted of many crimes of dishonesty. 6RP 118-19, 125-27.

Some circumstantial evidence connected Darden to the robberies. Evidence showed Darden and Lamar Travis communicated with one another on the night the robberies took place, while Darden acted like Travis was not his current friend when questioned by police. 3RP 22; 7RP 9, 30-31. A latent fingerprint lifted from the outside passenger door of the Buick belonged to Darden, although it could not be determined how long the print had been there. 5RP 44, 48, 64, 66-68. A call from Darden's phone was placed to Macy's account services later that night, and Matthyse's Macy's card had been taken. 4RP 20; 7RP 34.

On the other hand, Darden put on three alibi witnesses that placed him at his mother's home when the robberies took place, where he was sick. 7RP 123, 126-28, 143-44, 150, 152-56. The alibi defense was not rock solid. Phone records showed calls between family members and

Darden's phone at a time when Darden would have been at the family get together with those family members. 7RP 32, 54-55, 167-69. Still, Darden's mother testified that family members call one another while in the house together. 7RP 140. Also, there was an independent witness that corroborated testimony that Darden was sick. 7RP 121. All in all, the evidence was not so overwhelming that the tainted in-court identifications had no affect on the outcome. The trial court erred in declining to grant a mistrial and the convictions should be reversed.

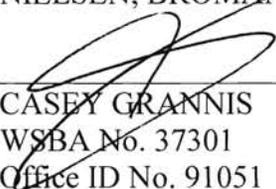
D. CONCLUSION

For the reasons set forth, Darden requests that this Court reverse the convictions.

DATED this 31st day of October 2014

Respectfully Submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 70253-0-1
)	
ORLEN DARDEN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF OCOTBER, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ORLEN DARDEN
DOC NO. 300261
COYOTE RIGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF OCOTBER, 2014.

X Patrick Mayovsky